highwater mark did not invoke the legal consequences of an avulsion.

The Respondent answers that there is no conflict between the report of the Master and the opinion of the Court of Appeals because the factual situations in the two cases are materially different. The Master in **Louisiana v. Mississippi**, supra, did not have before him the question presented to the Circuit Court of Appeals below. In particular, the Respondent contends that the changes of the channel in **Louisiana v. Mississippi** occurred entirely by erosion. No avulsion within or without the bed of the river occurred. In the case at bar a true avulsion occurred around a permanent mass of land.

The Petition must fall of its own weight unless there is a linking factual similarity between the two cases. Otherwise, any statement of the Master concerning an avulsion was unnecessary to the decision. Respondent submits that the cases are materially divergent on their facts and that the Master made no finding or ruling which was pertinent to, or in conflict with the ruling of the Court of Appeals in the case at bar.

ARGUMENT AGAINST GRANTING WRIT OF CERTIORARI.

There Is No Conflict Between the Case at Bar and Louisiana v. Mississippi.

The factual situation in the case at bar is clearly set forth by the Circuit Court of Appeals in its opinion (Appendix to Petition, pages A-4 through A-7), and in the opinion of the District Court reported in 232 Federal Supplement 944, at pages 997-999.

The area in controversy here developed as an Arkansas accretion bar in a bend of the Mississippi River, the main channel of which marked the boundary between the States of Arkansas and Tennessee. As early as the year 1930, the river began eroding deeply into the concave Tennessee Bank which was accompanied by a correnponding accretion to the Arkansas shore. As the bend narrowed and became more extreme by this process, it so menaced navigation that the U. S. Corps of Engineers, the agency charged with the maintenance of the channel, undertook the dredging of a new and distinct channel over and across the Arkansas accretion in an effort to sever it, and thus improve navigability.

For several years this project was unsuccessful and the river refused to leave its ancient and chosen channel known as the "Bendway". This undertaking finally succeeded in 1938 when the river abandoned its former channel (the "Bendway") and adopted as its main channel the new "Pointway Channel", prepared for it partly by dredging and partly by the natural scouring action of the floodwaters of the Spring of that year.

At the time the "Bendway Channel" was abandoned in favor of the 'Pointway Channel", the area in controversy, a sizeable land mass consisting of some 700 acres, was above the water at low and medium stages and hubmerged

by but 4 feet of water at ordinary highwater stage. The "Benway Channel" remained intact and was separated from the "Pointway Channel" by the area in controversy, which was severed from its parent Arkansas accretion bar by this new channel. Under these facts the District Court concluded and the Circuit Court of Appeals affirmed, that the change in channel was sudden and perceptible and, therefore constituted an avulsion and resulted in no change in public or private boundaries.

This Petitioner asks a review of that decision asserting that the opinion of the Circuit Court of Appeals for the Eighth Circuit is in irreconcilable conflict with the opinion of the Special Master approved by the Supreme Court in **Louisiana v. Mississippi,** 384 U. S. 24. A factual comparison of the cases discloses no similarity nor conflict.

In **Louisiana v. Mississippi,** the controversy concerned the location of the state line in the area of an oil pool. Prior to 1954, this pool lay on the west or Louisiana side of the thalweg of the Mississippi River. In 1955 the channel migrated westwardly passing over the oil well, which since that time has been located on the east or Mississippi side of the thalweg. Mississippi claimed the well contending that the movement of the river was gradual and by erosion at all times and that, as a consequence, the state line moved with the thalweg. Louisiana asserted continued ownership contending that an avulsion had occurred in this reach of the river during the floods of 1950 through 1952 and that, as a consequence, the state line became fixed and unaffected by the migrating channel. The issue, as in the case at bar, was whether the facts would disclose that an avulsion had occurred.

The record indicated that in about 1933 a man-made avulsion known as "Glasscock Cutoff" occurred upstream. Prior to that time, the erosion had been eastward into Mississippi, but subsequent to the avulsion the erosion had been westwardly into Louisiana. In 1950 through 1952,

there was a period of unusual highwater. Louisiana contended that these floods created a distinct avulsion by directing the flow of the channel within the banks of the river some 1,000 feet west of the existing channel, and, therefore, that the new channel "was created entirely separate from the old channel and in an avultive fashion" Master's Report at page 18).

It should be observed that there was no mass of land between the thalweg as located in 1950 and its location in 1952. There was, in fact, only deep water.

The Master rejected the contention that any avulsion occurred and found on these facts that the channel change was at all times gradual and imperceptible, and accordingly that the State line had moved by the process of erosion and accretion. There was no movement by any avultive process whatever. In the Master's Report, at page 20, he stated:

> "In the instant case there was a **gradual reversal** of the trend of **erosion** and **accretion** from one side of the river to the other. This reversed trend began not later than 1940 in the area directly below the foot of the cutoff and has continued at all times during that period from that date until 1964. It is true that a great portion of the reversed process occurred during the flood which began in 1950 and the prolonged highwater that continued through 1951 and a part of 1952. This is natural, for greater river action always occurs in periods of highwater. However, a close study of the hydrographic surveys for those years, 1932-1964, points out the **overall gradualness** of the change of the thalweg south of Glasscock Cutoff." (Master's Report, page 20. Emphasis supplied.)
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> "The **gradual proces of erosion** whereby the channel was being forced to the west initially at the foot of the cutoff and increasing gradually downstream

was accelerated in the 1950-52 flood and highwater period. This resulted in the deepening of the water on the Louisiana side in an area below the well. By the time of the October 1952 survey, this accelerated process had ceased and while there were some rises thereafter, no unusual highwater for several years thereafter. Channel change was therefore gradual after October 1952, and is reasonable to assume a **constant rate of change** between that date and 1964." (Master's Report, page 24, Emphasis supplied.)

* * * * * * * *

"I conclude that in October 1952 the true thalweg or main navigable channel was one **gradually moving** from the deep water on the Louisiana side toward the deep water on the Mississippi side, * * *." (Master's Report, page 28.)

"At the same rate of movement toward the west the thalweg was directly over the bottom hold on February 27th, 1955. Therefore, on February 27th, 1965, the boundary was on the western side of the well and the well became located in Mississippi. I treat the boundary to have moved at this **constant rate ever since,** * * *." (Mater's Report, page 29, Emphasis supplied.)

This Court in its opinion approving the Master's Report emphasized the gradualness of the change:

"At all times between October 3, 1952, and April 10, 1964, the live thalweg has moved at a constant rate. The boundary location for any intervening period at any point in Deadman's Bend (from the foot of Glasscock Cutoff to range 334.5 AHP) is to be determined mathematically by calculating the constant rate of change for that particular place in Deadman's Bend, using the 1952 and 1964 thalwegs described heretofore and the appropriate time differentials." (**Louisiana v. Mississippi,** 384 U. S. 24 (1966).)

It is, therefore, clear that the factual conditions in **Louisiana v. Mississippi** were altogether different from those in the case at bar. It is equally as clear that the Master rejected Louisiana's contention **as a matter of fact** and not of law as petitioners urge.

The Master found that the movement of the channel was constant and gradual, and was not called upon to decide the question which would have been presented had Louisiana's contention that an avulsion occurred been supported by the facts.

The Master did not have before him a situation where the thalweg changed its location around a large area of land, and his comments are therefore inappropriate to the instant case. As stated by the Court of Appeals in its opinion on Page A12 of the Petition (footnote No. 5), the case of **Louisiana v. Mississippi** is "inapposite".

CONCLUSION.

For the reasons set forth herein, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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